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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

# No. 226

ROMAN MONTOYA,

*Petitioner,*

*vs.*

TIDE WATER ASSOCIATED OIL COMPANY,

*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Roman Montoya, respectfully shows to this Honorable Court:

I

### Summary Statement of Matter Involved

Your petitioner seeks review of a decision of the Court of Appeals for the Second Circuit affirming [1] the judgment entered in the United States District Court for the Southern District of New York dismissing petitioner's complaint after trial.

The suit presents several issues of fundamental importance to merchant seamen involving the legality of certain Decisions of the Maritime War Emergency Board relating to the rights of merchant seamen who became prisoners of war; the violation of basic sections of the Seamen's act of 1872, 46 U.S.C.A. 564, 565, 600, 626, 627 governing the requirements of shipping articles, the pro-

[1] Judge Frank dissented.

tection of seamen's wages and the disposition of the effects of deceased seamen; and the obligation of a shipowner to pay wages to a living seaman, after the shipowner has had the seaman declared presumptively dead and his wages have been paid over and distributed through administration to next of kin.

Petitioner signed shipping articles for a foreign voyage on respondent's tanker "S.S. William F. Humphrey" which left New York on March 4, 1942 and was sunk on July 16, 1942 by a German raider in the Pacific. He was taken prisoner by the Germans who turned him over to the Japanese who interned him on land from November 1, 1942 until he was liberated by the Americans on August 15, 1945, and repatriated on September 18, 1945.

The first page of the shipping articles contained a rider declaring certain decisions of the Maritime War Emergency Board to be applicable.[2] Exercising the option granted by Decision No. 5, the respondent on September 17, 1942 requested and on November 19, 1942 the Maritime War Emergency Board issued a certificate of the presumptive death of petitioner.[3] Whereupon respondent deposited with the Shipping Commissioner in New York the sum of $1,248.07 due the petitioner at the time of his presumed death. The Shipping Commissioner in turn deposited this sum with the United States District Court for the Southern District of New York. Thereafter the money was paid to the administrator of petitioner's estate who had been appointed by a Court in Louisiana. By the time petitioner

[2] The rider stated that Maritime War Emergency Board Decisions No. 1, dated December 22, 1941; No. 2 with attachments 1, 2, and 3, dated January 10, 1942; No. 3 dated January 20, 1942; No. 4 dated January 22, 1942; No. 5 revised February 21, 1942; and No. 6 dated February 24, 1942, were applicable.

[3] It should be noted that respondent requested that petitioner should be declared presumptively dead, only two months after the vessel was lost, and that the Board acted on this request without even waiting what would normally appear to be a reasonable period, in view of the difficulties of communication existing due to war conditions.

was repatriated, the administrator had disposed of the money in such a way that it was lost to the petitioner. Upon his repatriation the Maritime War Emergency Board corrected its certificate of presumptive death and deleted petitioner's name therefrom. Petitioner's demand that respondent pay him his earned wages was rejected because of respondent's prior payment of wages to the Shipping Commissioner.

The text of the Decisions of the Maritime War Emergency Board referred to in the rider attached to the first page of the shipping articles, was not set forth, but was incorporated therein by reference. This was in violation of 46 U. S. C. A. 564, Section 8.

The Court found as a fact that petitioner was never shown the first page of the shipping articles, nor were the articles and the text of the Maritime War Emergency Board Decisions read to him. He did not know, therefore, that he was to be bound by these Decisions. When he signed the articles, a matter of no more than a minute, the front page of the articles was covered and was lying face downwards on the table. The failure to show or acquaint petitioner with the contents of the articles was in violation of 46 U. S. C. A. 565.

The signing on was superintended by two of the ship's officers and by the United States Shipping Commissioner. The Shipping Commissioner, in the presence of these two officers, told petitioner the amount of his wages, and also that he would receive his wages plus a monthly bonus of $100 until he would be returned to New York.[4] This was in fact a misrepresentation of the articles. They contained no such obligation and Decision No. 5 (incorporated by reference) appears to have provided, albeit in rather ambiguous language, that in the event of capture or internment of a seaman the liability of the shipowner was limited solely to the payment of wages.

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[4] This was found as a fact by the Trial Court (R. 134).

Upon his repatriation, petitioner was paid an amount equivalent to his base wages for the period of his internment. He was refused, however, the additional monthly bonus of $100, for the same period, because of Decision No. 5 of the Maritime War Emergency Board, which had been incorporated by reference in the shipping articles.

Suit was filed to recover:

1. Wages in the sum of $1,248.07. This sum represented earnings from March 4, 1942 to July 16, 1942 (when petitioner became a prisoner of war), and Maritime War Emergency Board "benefits" from July 17, 1942 to November 19, 1942 (when petitioner was declared presumptively dead).

2. Double wages pursuant to 46 U. S. C. A. 596-7 for failure to pay petitioner's earned wages after his repatriation to the United States.

3. War bonus at $100 per month, for the period petitioner was interned ashore as a prisoner of war, from November 2, 1942 to September 7, 1945, amounting to $3,400 (either on *quantum meruit* under 46 U. S. C. § 575, or based on the oral representation of the Shipping Commissioner, in the presence of the ship's officers, that this was one of the terms and conditions of his employment).[5]

The opinion of the United States District Court is reported in 79 F. Supp. 677 (R. 36).

The opinion of the Court of Appeals is reported in 174 F. (2d) 607 (R. —).

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[5] There were also alleged additional claims for "service record compensation" at the rate of 10% of base pay amounting to $266., and "vacation pay" at the rate of 21 days per year amounting to $222.39, from the date of the loss of the vessel (July 17, 1942) until petitioner's repatriation (September 18, 1945). Petitioner contends that he continued as an employee in the service of the respondent during his internment, and was entitled to these additional items pursuant to the collective bargaining agreement covering his employment.

## II

The jurisdiction of this Court rests on Title 28, U. S. C. A. Section 1254(1) and 2101(c) eff. September 1, 1948.

The decision of the Court of Appeals in the instant case was rendered on May 5, 1949 and the mandate was entered on June 20, 1949.

## III

### Questions Presented

1. Where a seaman is taken as a prisoner of war, and declared presumptively dead, does he lose his right to recover his earned wages, if the employer has deposited them with the Shipping Commissioner, and the wages have eventually been distributed through administration to the seaman's next of kin, and spent in the mistaken belief that the seaman was dead?

2. In light of 46 U. S. C. A. 600 which provides that a seaman may not, even in writing, waive any right to wages and which specifically provides that "* * * every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship * * * shall be wholly inoperative", could petitioner validly have consented to the forfeiture of his earned wages and the payment thereof to next of kin, in the event he was declared presumptively dead pursuant to the provisions of Decision No. 5 of the Maritime War Emergency Board?

(Did the Maritime War Emergency Board, an agency created pursuant to voluntary agreement between shipowners and maritime labor organizations, and without legislative or executive authorization, have the power to promulgate Decision No. 5 and make it binding upon petitioner in view of 46 U. S. C. A. 600?)

3. Where a seaman's knowledge of English is limited, and he has never been made aware that he was bound by the Decisions of the Maritime War Emergency Board, although the front page of the shipping articles recited that certain of those Decisions would be applicable, and where the text of

the applicable Maritime War Emergency Board Decisions is not annexed to the shipping articles, to what extent, if at all, is the seaman bound by such Decisions—taking into consideration that there existed statutes (46 U. S. C. A. 564-565) which provide that the terms of the seaman's employment are to be set forth in the articles, and are to be made known to him?

4. Where a seaman, engaged during a war period, has been told by the Shipping Commissioner, in the presence of the ship's officers, at the time of signing shipping articles, that he will receive a bonus of $100 monthly, until he is returned to the United States, and he is then taken as a prisoner of war by the enemy, does the right of bonus continue during the period of his internment on land, until his repatriation, or is the bonus for that period to be denied, because the Maritime War Emergency Board has ruled, without the seaman's knowledge, and contrary to what he was told when he was signed on, that this bonus shall not apply while the men are prisoners on land?

5. Is a seaman entitled to war bonus payments during a period of internment on land, as a prisoner of war, when the union which is his collective bargaining agent has negotiated an agreement under which no arrangements were made for such bonus payments, but where the employer nevertheless entered into a personal employment contract with the seaman himself, under which the latter had the right to rely upon a Shipping Commissioner's representation, (made in the presence of the ship's officers assigned by the master to superintend the signing-on of the crew) that the war bonus would be paid under such circumstances, and that such provision was contained in the shipping articles?

## IV

### Reasons for Allowance of Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

1. From the very inception of this case, petitioner has relied upon *Scott* v. *McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108 (1894) as authority for the proposition that payment of money to a creditor's administrator, under the erroneous belief that the creditor is dead, does not extinguish the indebtedness, if it subsequently turns out that the man is alive.

This case has been cited with approval time and time again and it has been firmly established law since at least 1894.

The respondent has scrupulously avoided a discussion of this authority and, surprisingly, so did Judge Bondy and the Judges of the Court of Appeals.

It is respectfully submitted that petitioner's right to his earned wages is supported squarely by the holding of the *Scott* case, and that the denial of this claim would constitute deprivation of property without due process of law. (*Scott* v. *McNeal, supra,* p. 1114).

Especially would there appear to be a denial of due process in view of the unreasonable haste with which respondent and the Maritime War Emergency Board acted, in having petitioner declared presumptively dead, before there was even an adequate opportunity to learn whether he was, in fact, a survivor; and where there was no showing that they attempted any investigation to ascertain the true facts, before proceeding to dispose of his earned wages as though he were dead.

2. The Courts below were both of the opinion that when petitioner signed the shipping articles, incorporating by reference Decision No. 5 of the Maritime War Emergency Board, he agreed that he might be declared presumptively dead and that he was therefore bound by the administrative disposition made of his wages in accordance with 46 U. S. C. A. 626, 627. Neither Court, apparently, was persuaded by petitioner's contention that the disposition of a seaman's assets pursuant to 46 U. S. C. A. 626, 627, could

be binding only if the seaman were, in fact, dead and that such disposition was rendered nugatory if, in fact, the seaman was alive.

Neither, were the Courts below impressed by the argument that 46 U. S. C. A. 600 precluded the petitioner from consenting to be declared presumptively dead, if the effect of such consent was to work a forfeiture of his earned wages. If petitioner is correct in this latter contention, Decision No. 5 as construed and applied by the Courts below was in derogation of 46 U. S. C. A. 600 and petitioner's alleged consent to be declared presumptively dead was "wholly inoperative."

So far as our research discloses this is a case of first impression with respect to the consequences following the administration and distribution of a seaman's money pursuant to 46 U. S. C. A. 626 and 627 when, in fact, the seaman was alive at the time of distribution.

It is also a case of first impression with respect to the applicability of 46 U. S. C. A. 600 to a seaman's agreement to be declared presumptively dead.

3. In the instant case, petitioner was unable to read English with any facility. He did not read the articles. The Shipping Commissioner, so the Trial Judge found, "told him that he would receive a one-hundred dollars bonus until he returned to New York." The articles, and the Decisions incorporated by reference, did not so provide.

Petitioner has asserted that the circumstances under which he signed the shipping articles were in violation of (a) 46 U. S. C. A. 564, under which it is provided that the terms of a seaman's employment are to be set forth in the articles, including the amount of wages which each seaman is to receive, and (b) 46 U. S. C. A. 565 under which it is provided that the articles must be signed before a Shipping Commissioner who must make the contents thereof known to the seaman.

Accordingly, petitioner has contended that he was not bound by the Decisions of the Maritime War Emergency Board, since, otherwise, the effect of such Decisions would amount to a repealer of statutes enacted by Congress for the protection of seamen.

Judge Frank in his dissenting opinion upheld the petitioner. "In those circumstances, I think the authorities require us to hold that the articles did not bind the appellant, that as a result, no contract resulted from his signing them, and that he is entitled to recover in *quantum meruit*," 174 F. (2d) 607, 610-611.

Whether, as Judge Frank suggested, "no contract resulted," or, whether, as petitioner has contended, the Decisions of the Maritime War Emergency Board were not binding upon him, in any event, an important question is presented with respect to the requirements of an employment contract of merchant seaman.

4. If it should be found that the contract petitioner made required the respondent to pay him a one hundred dollars bonus until he returned to New York, the further issue is presented as to whether such bonus should be paid during petitioner's internment on land and the applicability of Maritime War Emergency Board Decisions opposing such payment.

This latter question has been before the Courts on several occasions with varying results:

In *Agnew et al.* v. *American President Lines, Ltd.*, 1949 A. M. C. 1007, — F. (2d) — (C. A. 9th, May 5, 1949) and in *Steeves et al.* v. *American Mail Line, Ltd.*, 154 F. (2d) 24 (C. C. A. 9th, 1946) the Court held that ambiguities in a seaman's employment contract should be resolved in his favor; and that an ambiguously phrased promise to a seaman, that he would be paid war bonus in the event of internment, was to take precedence over contrary decisions of the Maritime War Emergency Board, or even a contrary

provision in an applicable collective bargaining agreement. See also *Elgin, J. & C. Ry Co.* v. *Burley et al.*, 325 U. S. 711, 744, 65 Sup. Ct. 1282, 1299 (1945).

On the other hand a contrary conclusion was reached in the instant case, and also in *Mason et al.* v. *The Texas Company*, 171 F. (2d) 559 (C. A. 1st, 1949).

Each of the cited cases required the Appellate Court to resolve the conflict between the original employment agreement as construed and the effect of the Maritime War Emergency Board Decisions. In the instant case some of the same issues are again present and should be resolved by this Honorable Court in view of the apparent conflict of opinion now current among the First, Second and Ninth Circuits.

V

For the reasons advanced in the brief supporting this application, your petitioner is advised and believes that the decision of the Court below (a) enunciates doctrine which appears to be in conflict with a decision of this Honorable Court, (*Scott* v. *McNeal*), (b) construes Decisions of the Maritime War Emergency Board with the effect of violating statutes enacted for the protection of merchant seamen (46 U. S. C. A. 564, 565, 600, 626, 627), (c) creates conflict of opinion among different Circuit Courts with respect to the payment of war bonus to seamen for the period that they were imprisoned in enemy territory.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted,

ROMAN MONTOYA, *Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1949**

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# No. 226

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ROMAN MONTOYA,

*Petitioner,*

*vs.*

TIDE WATER ASSOCIATED OIL COMPANY,

*Respondent.*

## PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

### I

### Facts

Petitioner is a 55-year-old seaman, whose mother tongue was Spanish, and whose knowledge of English was limited (R. 40). The Court found this as a fact in its findings (R. 134). He had worked for respondent some 2 to 3 years prior to March 4, 1942, when he signed on the S.S. William F. Humphrey as a messman at the Port of New York (R. 31). Petitioner's monthly wages, as set forth in the shipping articles, were $87.50 per month, made up as follows: Basic monthly wage $70, temporary emergency increase wage $17.50 per month (R. 89).

It is not entirely clear whether petitioner was a member of any union at that time (R. 60-70), but at any rate, there was a collective bargaining agreement between the respondent and Tide Water Tankermen's Association, which

had been entered into on December 7, 1940, under which, as an incentive for remaining in continuous service with the company, respondent agreed to pay seamen employed on its vessels certain extra benefits. In this case, the extra benefits would be 10% of the basic monthly wages of $70, based on the seaman's service record (which benefit petitioner has received only until July 17, 1942, when he was captured), and one of the questions in this case is whether petitioner is entitled to that extra $7 per month, from the time of his capture, until his repatriation (R. 91, 92).

The same collective bargaining agreement also provided for vacation or vacation pay at the rate of 21 days for each year of service, and here, too, petitioner has received this benefit only until the date of capture; and one of the questions in the case is whether petitioner is entitled to vacation or vacation pay, to cover the period from the date of his capture until repatriation (R. 93).

The shipping articles called for return to a final port of discharge in the United States and they were signed in the following manner: The crew lined up outside the saloon, and each crew member was called in, one following behind the other (R. 34). Inside the saloon, the signing on was superintended by two of the ship's officers, and by the U. S. Shipping Commissioner (R. 35). The Shipping Commissioner, in the presence of these ship's officers, told petitioner the amount of his wages, and also that he would receive his wages, plus his $100 monthly bonus, until he would be returned to New York (R. 35-43). The Trial Court found this to be a fact in its findings (R. 134).

In signing the shipping articles, the front page was covered, and lying face downward on the table (R. 38). The only thing exposed to petitioner was that part of the articles containing the lines for the signature and addresses of the crew. The covered front page, lying face downward on the saloon table, was never shown to him (R. 38).

It so happens that the front page of the shipping articles (Plff.'s Ex. 1, R. 33) contained a rider, stating that certain specified Decisions of the Maritime War Emergency Board were to apply without however stating the text of the Decisions. However, petitioner was never told that he was bound by the Decisions of the Maritime War Emergency Board (R. 39), and he never even knew what they were (R. 40). The Trial Court found this to be a fact in its findings (R. 134).

The whole sign-on ceremony took about one minute (R. 43), and as soon as he finished signing the articles and was told about his wages and bonus, the petitioner was dismissed from the saloon, making room for the next crew member who followed (R. 80). There was no opportunity to read the front page (R. 58).

Thereafter, the ship sailed, and on July 16, 1942, she was attacked by a German raider (R. 45). Petitioner was taken as a prisoner of war and eventually, he was placed in a Japanese concentration camp (R. 46), on November 1, 1942, remaining there until he was liberated, about August 15, 1945. He was subsequently repatriated to the United States, and arrived back in New York on September 18, 1945 (R. 96).

Meanwhile, the Maritime War Emergency Board, pursuant to respondent's request of September 17, 1942 (Plff's Ex. 2, R. 51), had issued a certificate on November 19, 1942, declaring the petitioner presumptively dead,* (Deft's Ex. B, R. 87), and on December 4, 1942, defendant deposited with the United States Shipping Commissioner, in the port

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* Decision No. 5 of the Maritime War Emergency Board (Deft's Ex. D, R. 87), provides that in the event of the internment of any of the personnel of a vessel, where it is unknown if the crew member has lost his life, the shipowner (with the approval of the Maritime War Emergency Board) "shall have the option of declaring the seaman presumptively dead."

of New York, the sum of $1,248.07, made up as follows (R. 94, 95):

a) Earned base wages, emergency wage increases, additional service record compensation, plus war bonuses under Maritime War Emergency Board Decision No. 2, earned by petitioner up to and including July 16, 1942, when the vessel was lost due to enemy action, in the total sum of $862.32

b) Wage "benefits" under Maritime War Emergency Board decision No. 5, revised, from July 17, 1942 (date of capture) to November 19, 1942 (date of issuance of certificate of presumptive death), at $87.50 per month, in the total sum of $385.75.

On December 26, 1942, while the petitioner was a prisoner in the hands of the enemy, the Maritime War Emergency Board revised Decision No. 5, to provide that in the event of the death, or presumed death, of a seaman, the unallotted wages payable up to the date of destruction or abandonment of a vessel, shall be paid over by the operator to the Shipping Commissioner, in accordance with law (121; Deft's Ex. D, R. 87).

It will be noted that the money had been deposited with the Shipping Commissioner, even before the amendment to Maritime War Emergency Board Decision No. 5, above referred to, i. e., the money was deposited December 4, 1942, and the amendment occurred December 26, 1942.

At any rate, the Shipping Commissioner deposited the $1,247.07 with the United States District Court (S. D. N. Y.) and, about July 31, 1943, that amount was paid out by the Court, to the administrator of the petitioner's estate, who had meanwhile been appointed by a Louisiana Court (R. 95). The administrator paid this money out to the petitioner's next of kin, i. e., his nephew who was also a seaman, and who spent the money within the next two years (R. 49, 50).

When petitioner was subsequently repatriated, following his liberation, he had his said nephew come to see him, but was unable to obtain reimbursement (R. 50). Meanwhile, he had promptly demanded payment of this money from the respondent, and his demand had been refused (R. 47-49). The Trial Court so found (R. 129).

Following his liberation, the respondent did pay the petitioner his earned wages, at the rate of $87.50 monthly from November 19, 1942 (date of issuance of certificate of presumptive death) to September 18, 1945 (date of repatriation), plus certain bonuses to cover only the period while a prisoner of war on enemy vessels and while in transit during the course of repatriation, pursuant to Maritime War Emergency Board Decision No. 5, revised (R. 97, 98).

On October 3, 1945, the Maritime War Emergency Board issued an order, correcting the certificate of presumptive death, by deleting petitioner's name from the list of the missing crew members (Deft's Ex. C; R. 87).

Respondent has refused to pay petitioner (a) wage earnings equal to the $1,248.07, which had been deposited with the U. S. Shipping Commissioner and which eventually had been paid over to the administrator, and disposed of to the next of kin; (b) war bonus at $100 per month, from November 2, 1942 to September 7, 1945, while petitioner was a prisoner of war on land, or on land after liberation, awaiting repatriation, which sum would come to $3,400 (R. 104); (c) additional compensation for service from the date of capture on July 17, 1942, until repatriation on September 18, 1945, at 10% of the $70 monthly base pay rate (i. e., $7 per month), in the sum of $266 (R. 104); (d) vacation or vacation pay at 21 days per year for service for the same period, from July 17, 1942 to September 18, 1945, at the monthly base pay rate of $70 per month, plus $1.20 per day subsistence allowance, which vacation pay would come to $222.39 (R. 105).

## II

### Errors Relied On and Summary of Arguments Specified as Grounds of Appeal

1. The decision of the Court of Appeals for the Second Circuit in the instant case appears to be opposed to the decision of this Honorable Court in *Scott* v. *McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108 (1894).

2. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner could validly agree to waive his right to wages, in the event that he was declared presumptively dead, following the loss of the vessel, would appear to be in conflict with 46 U. S. C. A. 600.

3. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner was bound by shipping articles which did not set forth the text of the Maritime War Emergency Board Decisions referred to therein and which were not made known to him by the Shipping Commissioner, would appear to be in conflict with 46 U. S. C. A. 564, 565.

4. The decision of the Court of Appeals for the Second Circuit in the instant case that respondent had discharged its obligation to petitioner by depositing his earned wages in the sum of $1,248.07 with the Shipping Commissioner, in accordance with the provisions of 46 U. S. C. A. 626, 627 would appear to be a misconstruction of said statutes. Utilization of these provisions is not binding when, in fact, the seaman is alive.

5. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner was not entitled to a $100 monthly bonus during the period of his internment by the enemy, as he had been given to understand by the U. S. Shipping Commissioner, in the presence of the ship's officers, at the time he signed on, would appear to be in conflict with *Steeves et al.* v. *American Mail Line, Ltd.*,

9th Cir. 154 F. (2d) 24, and *Agnew et al.* v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N. D. Cal. 1947) rev. (9th Cir. May 5, 1949) 1949 A. M. C. 1007, Cf. *Mason et al.* v. *The Texas Company* (1st Cir. 1949), 171 F. (2d) 559.

6. The decision of the Court of Appeals for the Second Circuit in the instant case that petitioner's period of "service" terminated with the destruction of the vessel, would appear to be an erroneous interpretation of the employment contract made by the petitioner.

## III

### The Payment to the Administrator Did Not Extinguish Respondent's Debt to Petitioner

In *Scott* v. *McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894), a plaintiff had disappeared under circumstances which justified his relatives in concluding that he had been murdered. He was subsequently declared dead by a probate court, based on a state statute which provided for a presumption of death where a person was absent for more than seven years. All of the requirements of the state law as to notice, publication, etc., were given, and an administrator was duly appointed. The administrator took over the plaintiff's property and sold it to the defendants in good faith. Subsequently, the plaintiff turned up, very much alive, and demanded the return of his property. The defendants argued that, the state statute having been fully complied with, and since they were entirely innocent in the matter, the lawfully appointed administrator had passed good title to them. The highest court of the state found for the defendants, but this was reversed by the United States Supreme Court, Mr. Justice Gray stating at page 1114:

> "The receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title.

> The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death that the probate court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority; and he is not bound, either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.
>
> In a case decided in the circuit court of the United States for the southern district of New York in 1880, substantially like Roderigas *v.* Institution, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the fourteenth amendment of the constitution of the United States. This court concurs in the proposition there announced."

This *Scott* case has been cited with approval time and time again and it has represented firmly established law since at least 1894.

The respondent here claims that once the certificate of presumptive death was issued, it became incumbent upon it to deposit petitioner's wages in accordance with the statutory requirements applicable to a deceased seaman. But the respondent overlooks the fact that the statutes pertaining to

the disposition of wages of a deceased seaman have no application to this case, because the petitioner is not, in fact, a deceased seaman.

Further, a certificate of presumptive death could not have been issued had not the respondent itself "exercised its option" under Maritime War Emergency Board Decision No. 5 to have the petitioner declared presumptively dead.

The option was exercised for the respondent's benefit. Until the certificate was issued, respondent continued liable for the payment of base wages to the seaman until his repatriation.

Since petitioner's earned wages had been deposited on December 4, 1942, *i.e.*, previously, the Court of Appeals did not find it necessary to pass on the legality of the subsequent (December 26, 1942) Revision of Decision No. 5, which expressly provided for the disposition of wages due the seaman at the date of presumptive death.

At the time petitioner signed the articles, Decision No. 5 simply provided that a seaman might be declared presumptively dead. The Court below ruled that the subsequent Revision of December 26, 1942, merely made explicit the provisions of 46 U. S. C. A. 626, 627, and that the disposition of petitioner's wages in accordance with these statutes, exonerated the respondent. We respectfully submit that the Court was in error. We may reasonably assume that the Revision of Decision No. 5 on December 26 would not have been deemed necessary, unless some question had arisen as to what disposition should be made of the wages of a presumptively dead seaman. Presumably these wages could have been held for an indefinite period pending confirmation that the seaman was in fact dead. That the shipowner was given this discretion is indicated by the "option" given him to have the seamen declared dead. It was not mandatory that this be done. Nor was it mandatory, prior to December 26, 1942, that once a certificate of presumptive death did

issue, that the wages be distributed. The exercise of the "option" was largely in the shipowner's interest.

We know of no case which has held the distribution of a seaman's wages pursuant to 46 U. S. C. A. 626, 627 to be binding upon him because he was erroneously presumed to be dead.

In any event, petitioner was not bound by the Maritime War Emergency Board's Revision of Decision No. 5 on December 26, 1942, since it constituted a unilateral modification of petitioner's employment contract, long after his employment had commenced and after he had been taken as a prisoner of war.

*Steeves et al.* v. *American Mail Line, Ltd.* (9th Cir. 1946) 154 F. (2d) 24, 26;
*Lynch* v. *U. S.*, 292 U. S. 571, 54 S. Ct. 840 (1934);
*Elgin, J. & E. Ry. Co.* v. *Burley et al.*, 325 U. S. 711, 65 S. Ct., 1282 (1945);
*Weber* v. *The Supreme Tent, etc.*, 172 N. Y. 490 (1902);
*Ayers* v. *Grand Lodge of the Ancient Order, etc.*, 188 N. Y. 280 (1907).

## IV

## The Maritime War Emergency Board Was Not Set Up to Deprive Seamen of Their Wages, Nor Can Its Decisions Be Construed as Repealing Statutes Enacted for Their Protection.

The Maritime War Emergency Board came into being in 1941 because of the inability of shipowners and maritime labor unions to arrive at satisfactory bonus agreements due to the lack of current accurate information and because of the need for uniformity. It was a voluntary agreement among the parties. It was not the result of an Executive Order.[6]

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[6] See "Consolidated Legal Bulletin C-Merchant Seamen," pp. 59-61, published September 18, 1945 by General Counsel of the War Shipping Administration.

The Court below ruled that, under the shipping articles which he signed, petitioner agreed to be bound by the Decisions of the Maritime War Emergency Board. He was deemed, therefore, to have waived his right to wages when they were administratively distributed following the issuance of the certificate of his presumptive death. There is no Board Decision, however, which states specifically that a seaman is to be deprived of his wages where he is presumptively declared dead, and subsequently it turns out that he is alive.

What is more, the Court below overlooked a very important principle of law which applies to seamen's contracts, i. e., the principle that a seaman cannot give up any right to wages, or any remedy for the recovery of same, even by agreement; and that any such agreement, even if it were expressly stated in the articles (which here it is not), would be invalid. 46 U.S.C.A., Section 600 (R.S. Section 4536) explicitly states:

> "• • • every stipulation, by which any seaman consents to abandon his right to his wages in the case of the loss of the ship • • • shall be wholly inoperative."

For an analysis of the favored position of seamen's wages, see *Shilman* v. *U. S.*, 2nd Cir. 1947, 164 F. (2d) 649, cert. den., 333 U. S. 837, 68 S. Ct. 608 (1948).

Also, overlooked by the Court below were Sections 564 and 565 of Title 46 U.S.C.A. which prescribe that the shipping articles shall contain the employment agreement between the seaman and master, and that the Shipping Commissioner shall attach a certificate to the articles, confirming that each seaman has acknowledged that he has either read the articles or heard them read to him; that he was acquainted with its conditions, and understood same.

In our case, Mr. Montoya never knowingly consented, on signing the articles, that if he were to be taken as a prisoner

of war, and be presumptively declared dead, he would thereby lose his earned wages upon being subsequently found alive. On the contrary, he had every right to rely upon the Shipping Commissioner's statement, made in the presence of the ship's officers, at the time he was signed on, to the effect that his wages and bonus would be continued until he would be returned to the United States. And since the articles were signed during a period of war, it must be presumed that the parties had in mind the possibility that the vessel and its crew might be captured by the enemy and detained for a considerable period. The failure to insert the text of the Maritime War Emergency Board Decisions into the articles, and the failure to make petitioner aware of them, should be fatal to any contention that such Decisions delimited petitioner's rights as explained to him by the Shipping Commissioner in the presence of the officers, on which he had a right to rely fully.

*Boulton et al.* v. *Moore*, 14 Fed. 922, 926 (C.C. N.D. Ill. 1883);

*McDonald et al.* v. *U. S.* (2nd Cir. 1923), 292 Fed. 593, 594.

It may well be, as Judge Frank stated in his dissenting opinion that the failure to comply with the statutory requirements rendered the employment contract abortive and that petitioner should recover in *quantum meruit*. In any event, however, the Maritime War Emergency Board Decisions incorporated by reference in the shipping articles should not have been held binding upon the petitioner. To impose them upon the petitioner, as the Court below has ordered, is to disregard the statutory protection afforded seamen since 1872.[7]

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[7] That petitioner accepted certain benefits from the Maritime War Emergency Board does not require that he be bound by its Decisions. *Agnew et al.* v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N. D. Cal.), rev. on other grounds (9th Cir., May 5, 1949), 1949 A.M.C. 1007.

## V

### Petitioner Was Entitled to Bonus While He Was Held as a Prisoner of War by the Enemy

The Court below refused to award the plaintiff bonus during the period of his internment because the Maritime War Emergency Board in Decision No. 5 had ruled that a seamen's war bonus should only be paid while he was at sea, or in transit to and from war zones.

This, however, completely overlooks the fact that the petitioner's claim for bonus does not rest upon the Decisions of the Maritime War Emergency Board. Petitioner's claim for $100 bonus, to cover the period of his internment, rests upon either *quantum meruit* under 46 U. S. C. § 575, or upon the Shipping Commissioner's statement to him, at the time of signing him on, in the presence of the ship's officers, to the effect that not only his wages, but also his bonus, would continue until such time as petitioner would be repatriated. The Court below, having found this to be the fact, it is difficult to understand why this promise should not be attributed to this respondent. The respondent, in directing that certain of its officers be present at the time the crew members were signed on, must be deemed to have done so with knowledge of the provisions of 46 U.S.C.A., Section 565, to the effect that the Shipping Commissioner must make the seamen acquainted with the conditions under which they were being employed. If the purport of the articles were not being properly represented by the Shipping Commissioner, then the respondent's officers, detailed to the particular task of superintending the sign-on, were under a duty to speak and straighten out the error, if there was any error.

It is reasonable to assume that the officers, as well as the petitioner, all understood that the seamen were being employed during a time of war, under articles recognizing that the vessel and its crew might be captured and in-

terned by the enemy, in which eventuality the wages and bonus were not to cease with the wreck or loss of the vessel, as provided under 46 U.S.C.A. 593, but that instead, the wages and bonus were to continue until such time as the respondent would eventually repatriate the crew.

That this was apparently the general understanding among seafaring men is borne out by the fact that several suits by seamen seeking bonus under such circumstances have been filed not only on the east coast, but also on the west coast.

*Steeves et al.* v. *American Mail Line, Ltd.* (9th Cir. 1946), 154 F. (2d) 24;

*Mason et al.* v. *The Texas Company* (1st Cir. 1949), 171 F. (2d) 559;

*Agnew, Jr., et al.*, v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N.D. Cal.), rev. (9th Cir. May 5, 1949), 1949 A.M.C. 1007.

The Court below refused to award bonus during the period of internment, because under Article 2 of Decision No. 5 of the Maritime War Emergency Board, the ship-owner was held to assume liability during periods of internment, only for basic wages and emergency wages, and not for bonus (R. 116, 119). The text of this Decision, however, was, as we have seen, not annexed to the articles, and was never made known to the petitioner.

Moreover, Decision No. 5 was not intended to apply to specific shipping article agreements between seamen and shipowners, and the jurisdiction of the Maritime War Emergency Board was limited solely to differences between the ship-operator and maritime labor unions.

*Steeves et al.* v. *American Mail Line, Ltd.* (9th Cir. 1946), 154 F. (2d) 24, 26.

There would appear to be a conflict of opinion among the Circuits as to applicability of bonus agreements to periods of internment.

*Cf. Steeves et al.* v. *American Mail Line, Ltd., supra; Mason et al.* v. *The Texas Company* (1st Cir., 1949), 171 F. (2d) 559; and *Agnew et al.* v. *American President Lines, Ltd.*, 73 F. Supp. 944 (N.D. Cal.), rev. (9th Cir., May 5, 1949), 1949 A.M.C. 1007.

## VI

**The Petitioner Continued to Be the Respondent's Employee During the Period of His Internment, and he Was Therefore Entitled to the Extra Service Benefit and Vacation Pay During His Internment.**

In "Consolidated Legal Bulletin-C-Merchant Seamen" (issued by the General Counsel of the War Shipping Administration on September 18, 1945), referred to above, the necessity for repatriating seamen, following the loss of their vessel, is dealt with commencing at page 77. The War Shipping Administration counsel points out at page 78 that ordinarily, under 46 U. S. C. 678-679, all of the owners' obligations to the mariners would be terminated on the wreck of the vessel, and that the seaman would be able to obtain repatriation, only if he were destitute. At page 80 he points out that, because of this, regulations were adopted so that "every seaman whose employment is terminated abroad by reason of a casualty occurring to his vessel, shall be repatriated to his port of shipment, and that wages, together with subsistence during transportation, shall be paid until the seaman arrives at the port of shipment."

It would seem, therefore, that the employment relationship continued, because respondent continued to pay the petitioner wages during the period of his internment, and

obligated itself to provide for his return transportation to the United States, in the event of and following just such a disaster as occurred herein.

The attorney for the respondent argued at the trial that a voyage automatically comes to an end, with the loss or wreck of a vessel, by statute; and the Court below adopted that view in reliance upon 46 U. S. C. 593, which only provides that the right to wages ceases with the wreck of a vessel. True, the voyage thus came to an end. However, there is a distinction between the voyage coming to an end and the employment relationship coming to an end.

*Enochasson* v. *Freeport Sulpher Co. et al.*, 7 F. (2d) 674, 675 (S. D. Texas, 1925);

*Southern S. S. Co.* v. *National Labor Relations Board, et al.*, 316 U. S. 31, 62 S. Ct. 886 (1942).

The fact that respondent chooses to call these payments "internment benefits," rather than "wages" (although they are in all respects equal to the exact wages fixed), and the fact that respondent may reimburse itself for this payment by insurance, is entirely immaterial. As the Court said in The Leonidas (4th Cir., 1940) 116 F. (2d) 440, 442:

> "There can be no question but that the so-called 'war bonus' was additional wages for extra-hazardous service. It was awarded as the result of a demand for increased wages, and was paid for services rendered and for nothing else. To call a portion of such wages a 'war bonus' does not alter its essential character. LaJuett v. Coty Mach. Co., 153 Misc. 410, 275 N. Y. S. 882; 5 Words and Phrases, Permanent Edition, 670."

See also *Venides* v. *United Greek Shipowners Corp.*, 168 Fed. 2nd 681 (2nd Cir., 1948).

## Conclusion

A writ of certiorari should issue to the Court of Appeals for the Second Circuit so that a decision may be obtained on the several questions raised by this appeal. Their determination will be of grave importance in Maritime Law since they affect the basic rights of merchant seamen.

Respectfully submitted,

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